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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

EGUMBALL, INC.,

Plaintiff and Appellant,

v.

CALL & JENSEN et al.,

Defendants, Cross-complainants and
Respondents;

JOHN BAUER,

Cross-defendant and Appellant.

G055852

(Super. Ct. No. 30-2016-00835991)

O P I N I O N

EGUMBALL, INC.,

Plaintiff and Respondent,

v.

CALL & JENSEN et al.,

Defendants and Appellants.

G055989

Appeals from a judgment of the Superior Court of Orange County, Sheila
Fell, Judge. Affirmed.

Lanza & Smith, Anthony L. Lanza, Brodie H. Smith; Greines, Martin, Stein & Richland, Mark J. Poster and Carolyn Oill for Plaintiffs and Appellants.

Call & Jensen and Wayne W. Call for Defendants and Appellants.

* * *

INTRODUCTION

Attorney John Egley and his law firm Call & Jensen (collectively the Call & Jensen parties) advised eGumball, Inc. (eGumball) and its founder and chief executive officer John Bauer (collectively the eGumball parties) in connection with the eGumball parties' plan and ultimate decision to terminate the employment of its human resources director. After the human resources director sued the eGumball parties for claims based on that decision, the eGumball parties retained Call & Jensen to provide legal representation in defending those claims. The human resources director obtained a favorable jury verdict.

To collect unpaid legal fees incurred in the litigation, Call & Jensen initiated arbitration proceedings, pursuant to the arbitration provision contained in one of the two engagement letters which comprise the parties' engagement agreement. eGumball filed a complaint in superior court against the Call & Jensen parties asserting claims for legal malpractice and breach of contract. Its claims were based, in relevant part, on the Call & Jensen parties' failure to disclose, at the outset of the litigation, the potential conflict of their defending the eGumball parties in the wrongful employment termination action after Egley had advised the eGumball parties regarding the underlying employment termination, thereby triggering the possibility Egley would testify as a witness at trial. The trial court granted the Call & Jensen parties' motion to compel arbitration of eGumball's claims and those claims were litigated, along with Call & Jensen's claim seeking unpaid attorney fees, in a seven-day arbitration hearing.

In his final award, the arbitrator found that the Call & Jensen parties' representation fell below the standard of care in their failure to disclose Egley's "advice

of counsel” witness/trial counsel conflict in the case, but further found that omission did not prejudice eGumball in the underlying litigation and did not constitute a violation of the Rules of Professional Conduct. The arbitrator awarded Call & Jensen the unpaid attorney legal fees the eGumball parties incurred in the underlying litigation, but denied its request for recovery of the attorney fees it incurred in the arbitration by its own attorneys internally representing the firm and also denied its request for recovery of expert witness fees.

The trial court granted the Call & Jensen parties’ petition to confirm the arbitrator’s final award, but denied their request to first “correct” the award to add approximately \$1 million in attorney fees they incurred internally in the arbitration, along with the expert witness fees, all of which the arbitrator had denied in his final award. The eGumball parties and the Call & Jensen parties separately appealed.

We affirm. As to the eGumball parties’ appeal, the trial court did not err by granting the petition to compel arbitration of eGumball’s claims based on the broad arbitration provision contained in the engagement agreement in which the parties agreed to arbitrate any claim arising out of their relationship. We reject the eGumball parties’ argument the parties’ engagement agreement was rendered void by the Call & Jensen parties’ failure to disclose the advice of counsel conflict. We apply the analytical framework set forth in *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.* (2018) 6 Cal.5th 59 (*Sheppard*) and conclude that, unlike *Sheppard*, here the disclosure omission was negligent and did not constitute a violation of any of the Rules of Professional Conduct. The eGumball parties’ additional argument the arbitrated claims were not arbitrable is forfeited. The parties’ arbitration agreement required the parties to submit questions of arbitrability in the first instance to the arbitrator for a ruling; the eGumball parties did not submit any such question to the arbitrator and no ruling on arbitrability is contained in the arbitrator’s final award.

With regard to the Call & Jensen parties' appeal, we reject their challenge to the arbitrator's decision to deny an award of internal attorney fees and expert witness fees. Because the arbitrator's alleged errors would constitute legal error in interpreting the engagement agreement, he did not exceed his authority in denying those requests.

BACKGROUND

I.

eGUMBALL'S COMPLAINT

eGumball filed a complaint in superior court alleging legal malpractice against the Call & Jensen parties and breach of contract against Call & Jensen. We summarize relevant allegations of the complaint as follows. In 2010, eGumball hired Kimberly Perry to establish its human resources department. In February 2013, eGumball determined Perry was not adequately performing her job. Before eGumball could take any disciplinary action against Perry, Perry announced she was pregnant and would take maternity leave; eGumball postponed taking any action until Perry returned from maternity leave.

The complaint further alleged eGumball sought the advice of the Call & Jensen parties regarding Perry. Egley advised eGumball it was within the company's "legal right" right to terminate Perry's employment upon her return to work. When Perry returned to work, eGumball terminated her employment. Perry filed a lawsuit against the eGumball parties, asserting claims for, inter alia, discrimination, wrongful termination, and intentional infliction of emotional distress (the Perry litigation). The eGumball parties entered into an engagement agreement with Call & Jensen to represent them in the Perry litigation.

The complaint also alleged that the Call & Jensen parties knew, since the beginning of the Perry litigation, that Egley was a potential witness in that case. It stated: "[Egley] had played an integral role in the decision to terminate Perry, and offered direct

advice to eGumball regarding Perry's subsequent unemployment claim. It was also known to [the Call & Jensen parties] that one of the defenses that might be employed by eGumball, especially with respect to the potential imposition of punitive damages available for some of Perry's causes of action, would be the 'advice-of-counsel' defense based on testimony from Egley. [¶] . . . Despite the potential to have Egley testify on eGumball's behalf, and the possibility to assert the advice-of-counsel defense, [the Call & Jensen parties] failed to inform eGumball of these options for its defense. [The Call & Jensen parties] further failed to identify the potential conflict inherent in these possibilities and failed to seek the informed written consent of eGumball necessary to proceed." In addition, the complaint alleged that at trial, eGumball asked Egley to testify on its behalf but Egley refused.

II.

CALL & JENSEN'S ARBITRATION DEMAND TO RECOVER UNPAID ATTORNEY FEES FROM THE PERRY LITIGATION.

Call & Jensen submitted to JAMS, and served on the eGumball parties, a "Demand for Arbitration Before JAMS" pursuant to the arbitration provision contained in one of the two engagement letters comprising the parties' engagement agreement retaining Call & Jensen as defense counsel in the Perry litigation. Call & Jensen demanded arbitration with respect to its claim the eGumball parties had not paid \$489,613.11 in attorney fees and costs they incurred in the Perry litigation and sought a judicial declaration that the Call & Jensen parties had not committed malpractice.

III.

THE TRIAL COURT GRANTS THE PETITION TO COMPEL eGUMBALL'S CLAIMS TO ARBITRATION.

The Call & Jensen parties filed a petition to compel arbitration of eGumball's claims. The petition was supported by the declaration of Wayne W. Call which stated that Call & Jensen entered into an engagement agreement with the

eGumball parties for legal representation in the Perry litigation which “consisted of two ‘sister’ engagement letters, each dated January 30, 2014, and each signed, simultaneously, by John Bauer, for eGumball and for himself, on January 31, 2014.”

One of the “two ‘sister’ engagement letters” contained the following arbitration provision: “**Complete Agreement and Fee Arbitration:** This engagement agreement is an integrated agreement reflecting fully all the terms of C&J’s engagement as attorneys for you in this lawsuit. If any provision of this agreement is held in whole or in part to be unenforceable for any reason, the remainder of the provision and of the entire agreement will be severable and remain in effect. While we hope that there will never be any dispute regarding our services, *any dispute arising out of or related to this agreement or C&J’s relationship with you* will be resolved by mandatory binding arbitration before a single arbitrator employed by JAMS, formerly ‘Judicial Arbitration & Mediation Services,’ in Orange County, California, in accordance with the JAMS Comprehensive Arbitration Rules and Procedures effective October 1, 2010 (‘Rules’), and with the prevailing party therein entitled to recover its attorneys’ fees and costs. A copy of the Rules is available at www.jamsadr.com and is being provided to you concurrently with this agreement, the receipt of which you acknowledge by signing below.” (Italics added.)

eGumball filed an opposition to the petition to compel arbitration arguing, in part, the petition relied “on an arbitration clause in an ancillary agreement which is nothing more than a conflict waiver.”

The trial court granted the petition to compel arbitration, stating in its minutes: “A valid arbitration agreement exists as to the Parties; The parties have clearly and unmistakably provided that the Arbitrator is to decide issues of arbitrability, by incorporating the JAMS Rules for Arbitration which provide the Arbitrator decides issues of arbitrability.”

IV.

THE ARBITRATOR'S FINAL AWARD

After a seven-day arbitration, the arbitrator issued a detailed 25-page final arbitration award. The arbitrator ultimately ruled against eGumball on its claims. The arbitrator concluded there was “insufficient evidence to demonstrate that ‘but for’” Egley’s negligent acts underlying the malpractice claim, the eGumball parties “would have received a better result” in the Perry litigation. The arbitrator concluded that with regard to eGumball’s breach of contract claim, which was based on the Call & Jensen parties’ alleged failure to “exercise the required skill and care in representing eGumball,” eGumball similarly failed to demonstrate “a causal nexus between the alleged failures and any resulting damage.” The arbitrator also rejected eGumball’s contention Egley’s negligence should result in a disgorgement of attorney fees to which Call & Jensen would otherwise be entitled.

The arbitrator concluded Call & Jensen was entitled to recover \$425,967.12 in attorney fees the eGumball parties incurred in the Perry litigation, plus 10 percent simple interest from December 31, 2015. The arbitrator concluded that, notwithstanding the prevailing party attorney fees provision contained in the engagement agreement, Call & Jensen was not entitled to recover prevailing party attorney fees that were incurred internally by its own attorneys in prosecuting and defending claims in the arbitration, noting such internally incurred fees “comprise[d] the bulk of attorney’s fees sought.” The arbitrator awarded Call & Jensen prevailing party attorney fees incurred by outside counsel Martin Deniston. The arbitrator awarded Call & Jensen its costs under Code of Civil Procedure sections 1032 and 1033.5, but denied its request for expert witness fees.

V.

THE TRIAL COURT GRANTS THE CALL & JENSEN PARTIES' PETITION TO CONFIRM THE AWARD BUT DENIES THEIR REQUEST TO FIRST "CORRECT" THE AWARD TO ADD AN AWARD FOR INTERNALLY INCURRED ATTORNEY FEES AND EXPERT WITNESS FEES.

The Call & Jensen parties filed a petition requesting the trial court to correct the final arbitration award by adding an award of its internally incurred attorney fees and expert witness fees in the arbitration and then confirm the arbitration award as so corrected. The eGumball parties filed an objection to the petition, urging the trial court to find "the attorney fee clause in the retainer agreement is void as against public policy because the contract was entered into with eGumball and John Bauer while a conflict of interest existed."

At the hearing on the petition to correct and confirm the arbitration award, the eGumball parties reiterated the argument that because the arbitrator had found the Call & Jensen parties "practiced below the standard of care and under a conflict of interest, and that that conflict of interest existed at the time that engagement agreement was entered into" the engagement agreement was rendered void. Their argument continued: "And in this case, the arbitration clause was also in that contract, that engagement agreement is now void. That should be void. There should have never been any jurisdiction in arbitration. But, of course, for us it was a bit of a chicken-or-the-egg question because we had to go to arbitration to get any findings to prove that. [¶] But as you know, when the legality of a contract—of an entire contract is called into question, that is an issue that goes back to the court to decide on a de novo review; the arbitrator cannot decide that."

The trial court did not grant the Call & Jensen parties' request that the arbitrator's final award be corrected, but the court granted the request that the final arbitration award be confirmed. In its minute order, the trial court stated: "The Arbitrator carefully considered each issue presented; The underlying agreement was not

illegal; The arbitrator did not exceed his powers; Deny Plaintiff[s]' request to vacate the award—Grant Defendants' request to confirm the award; Defendants to submit a proposed judgment.”

VI.

JUDGMENT IS ENTERED; THE eGUMBALL PARTIES' APPEAL IS CONSOLIDATED WITH THE CALL & JENSEN PARTIES' APPEAL.

Judgment Upon Confirmation of Arbitration Award was entered, which stated: “This matter having been ordered to binding contractual arbitration; such arbitration having been conducted; the Arbitrator's Final Award having been confirmed by this Court; and good cause appearing therefore; it is hereby ordered adjudged and decreed as follows:

“1. The Arbitrator's Final Award is hereby confirmed pursuant to Code of Civil Procedure Sections 1286 and 1287.4.

“2. eGumball, Inc. shall take nothing upon any of its claims against Call & Jensen and John Egley.

“3. Call & Jensen is hereby awarded Judgment against eGumball, Inc. and John Bauer, Jointly and severally, as follows:

“A. Damages—\$505,089.12 computed as follows:

\$505,089.12	(\$425,967.12 plus 10% simple interest [\$79,122] from 12-31-15 to November 8, 2017)
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“B. Costs (including attorneys' fees)—\$89,169.00 computed as follows:

\$51,709.00	(Attorneys' fees paid to Martin Deniston)
\$0.00	(The value of the time of attorney Wayne Call and paralegal Kathy Casford at Call & Jensen)

\$0.00	(Expert witness fees paid by Call & Jensen)
\$37,460.00	(Other costs paid by Call & Jensen, including JAMS fees, deposition costs, etc.)

“4. Call & Jensen is awarded its costs (including recoverable attorneys’ fees) incurred in these judicial proceedings, exclusive of fees and costs incurred in arbitration.

“The Court finds the Arbitrator did not exceed his powers.”

The Call & Jensen parties, on the one hand, and the eGumball parties, on the other hand, each appealed from the judgment. On our own motion, we ordered the two appeals consolidated for all purposes.

DISCUSSION

I.

APPLICABLE LEGAL PRINCIPLES AND STANDARD OF REVIEW

“California law favors alternative dispute resolution as a viable means of resolving legal conflicts. ‘Because the decision to arbitrate grievances evinces the parties’ intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels, arbitral finality is a core component of the parties’ agreement to submit to arbitration.’ [Citation.] Generally, courts cannot review arbitration awards for errors of fact or law, even when those errors appear on the face of the award or cause substantial injustice to the parties. [Citation.] This is true even where, as here, an arbitration agreement requires an arbitrator to rule on the basis of relevant law, rather than on principles of equity and justice. [Citations.]

“The California Arbitration Act (Code Civ. Proc., § 1280 et seq.) and the Federal Arbitration Act (9 U.S.C. § 10 et seq.) provide limited grounds for judicial review of an arbitration award. Under both statutes, courts are authorized to vacate an

award if it was (1) procured by corruption, fraud, or undue means; (2) issued by a corrupt arbitrator; (3) affected by prejudicial misconduct on the part of the arbitrator; or (4) *in excess of the arbitrator's powers*. (Code Civ. Proc., § 1286.2, subd. (a); 9 U.S.C. § 10(a).) An award may be corrected for (1) evident miscalculation or mistake; (2) *issuance in excess of the arbitrator's powers*; or (3) imperfection in the form. (Code Civ. Proc., § 1286.6; 9 U.S.C. § 11.)” (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 916, italics added.)

The eGumball parties’ appeal is based on the argument the arbitrator exceeded his powers in enforcing the engagement agreement because it was void due to the Call & Jensen parties’ failure to make required disclosures. (Code Civ. Proc., § 1286.2, subd. (a)(4).) They also argue the claims that were arbitrated were not covered by the arbitration provision contained in the engagement agreement. The Call & Jensen parties’ appeal is based on the contention the arbitrator exceeded his powers by denying Call & Jensen the attorney fees they incurred internally in arbitrating the parties’ claims, as well as their expert witness fees.

“Arbitrators may exceed their powers by issuing an award that violates a party’s unwaivable statutory rights or that contravenes an explicit legislative expression of public policy. [Citations.] However, “[a]rbitrators do not ordinarily exceed their contractually created powers simply by reaching an erroneous conclusion on a contested issue of law or fact, and arbitral awards may not ordinarily be vacated because of such error.”“ (*Richey v. AutoNation, Inc.*, *supra*, 60 Cal.4th at pp. 916-917.)

II.

The eGUMBALL PARTIES’ APPEAL

In their appeal, the eGumball parties primarily argue the judgment must be reversed and the arbitration award vacated because the arbitrator exceeded his powers by enforcing the parties’ engagement agreement which they contend was void due to the Call & Jensen parties’ failure to disclose Egley’s conflict of interest. During the

pendency of this appeal, the California Supreme Court decided *Sheppard, supra*, 6 Cal. 5th 59, which confirms the analytical framework within which we consider the eGumball parties' argument.¹

A.

Sheppard, supra, 6 Cal.5th 59

In *Sheppard, supra*, 6 Cal.5th 59, a large law firm agreed to represent a manufacturing company in a federal qui tam action brought on behalf of a number of public entities. (*Id.* at pp. 67-68.) Before entering into the engagement agreement with the manufacturing company, the law firm ran a “conflicts check” which revealed that the law firm had represented one of the public entities involved in the qui tam action, but that their representation involved employment-related work unconnected with the qui tam action. (*Id.* at p. 69.) Because the prior public entity client had signed an advance waiver of conflicts in cases unrelated to the matters in which it had received representation from the law firm, the law firm determined it could take on the manufacturing company's representation; the law firm did not disclose its representation of the public entity to the manufacturing company, or vice versa. (*Ibid.*) In its engagement agreement with the law firm, the manufacturing company agreed to waive current and future conflicts of interest; the agreement, however, did not refer to the law firm's public entity client or the law firm's relationship to it. (*Ibid.*)

When the public entity discovered the law firm's conflict, it successfully moved to have the firm disqualified from representing the manufacturing company in the qui tam action. (*Sheppard, supra*, 6 Cal.5th at p. 70.) The law firm sued the manufacturing company for unpaid bills; the manufacturing company asserted claims against the law firm and sought disgorgement of fees previously paid to the law firm and punitive damages based on the law firm's failure to disclose the conflict in representation.

¹ The parties filed supplemental briefs addressing the applicability of *Sheppard* to the instant appeals.

(*Id.* at pp. 70-71.) The trial court granted the law firm’s petition to compel arbitration pursuant to the arbitration provision contained in the engagement agreement. (*Id.* at p. 71.) The arbitrators ruled in the law firm’s favor and the superior court confirmed the award, but the Court of Appeal reversed, concluding “the matter should never have been arbitrated because, notwithstanding the broad conflict waiver in the engagement agreement, the law firm’s undisclosed conflict of interest violated rule 3-310(C)(3) of the Rules of Professional Conduct. This ethical violation, the court ruled, rendered the parties’ agreement, including the arbitration clause, unenforceable in its entirety.” (*Id.* at p. 68.) The appellate court held that the law firm’s conflict of interest disentitled it from receiving any compensation for the work it performed for the manufacturing company while also representing the public entity client in other matters. (*Ibid.*)

In its decision, the California Supreme Court reiterated that “[w]here, as here, an arbitrator has issued an award, the decision is ordinarily final and thus ‘is not ordinarily reviewable for error by either the trial or appellate courts’” with limited exceptions, including, as argued in the instant appeals, the arbitrator exceeded his powers. (*Sheppard, supra*, 6 Cal.5th at p. 72.) The Supreme Court concluded, applying the framework established in *Loving & Evans v. Blick* (1949) 33 Cal.2d 603, that the excess-of-authority exception applies and an arbitral award must be vacated when a court determines that the arbitration has been undertaken to enforce a contract that “is ‘illegal and against the public policy of the state.’” (*Sheppard, supra*, 6 Cal.5th at p. 73.)

In *Sheppard*, it was undisputed the law firm’s failure to disclose its representation of two clients involved in the same matter “came within the scope” of the then applicable former rule 3-310(C)(3) of the Rules of Professional Conduct. (*Sheppard, supra*, 6 Cal.5th at pp. 80-81.) The law firm argued, however, that the “illegality exception should apply only to contracts that are found to violate public policy as it has been declared by the Legislature” and that because “the Rules of Professional Conduct are not promulgated by the Legislature, . . . a violation of the rules can afford no

ground for vacating an arbitration award” under Code of Civil Procedure section 1286.2, subdivision (a)(4). (*Sheppard, supra*, at p. 73.)

The Supreme Court rejected the law firm’s argument, stating: “California courts have held that a contract or transaction involving attorneys may be declared unenforceable for violation of the Rules of Professional Conduct, the set of binding rules governing the ethical practice of law in the State of California. In *Chambers v. Kay* (2002) 29 Cal.4th 142 (*Chambers*), this court refused enforcement of a fee division agreement undertaken without written client consent, on the ground that the arrangement violated the Rules of Professional Conduct. We noted that the California State Bar is authorized by statute to formulate these rules, and they are adopted with the approval of this court. [Citations.] To enforce the fee division agreement, we observed, would be to countenance ‘a violation of a rule we formally approved in order “to protect the public and to promote respect and confidence in the legal profession.”’ [Citation.] It would be ‘absurd,’ we concluded, for a court to aid an attorney in enforcing a transaction prohibited by the rules. [Citation.] Both before and after *Chambers*, Courts of Appeal reached similar conclusions about similar fee-splitting arrangements in violation of the Rules of Professional Conduct. As the court explained in *Altschul v. Sayble* (1978) 83 Cal.App.3d 153, the rules ‘are not only ethical standards to guide the conduct of members of the bar; but they also serve as an expression of public policy to protect the public.’ [Citations.] *It follows that an attorney contract that has as its object conduct constituting a violation of the Rules of Professional Conduct is contrary to the public policy of this state and is therefore unenforceable.*” (*Sheppard, supra*, 6 Cal.5th at pp. 73-74, italics added.)

The *Sheppard* court acknowledged “the merits of an arbitral award are not generally subject to judicial review,” but held ““the rules which give finality to the arbitrator’s determination of ordinary questions of fact or of law are inapplicable where the issue of illegality of the entire transaction is raised in a proceeding for the

enforcement of the arbitrator's award.”” (*Sheppard, supra*, 6 Cal.5th at p. 74.)

Therefore, “[w]hether a contract is entirely illegal, and therefore unenforceable, is an issue ‘for judicial determination upon the evidence presented to the trial court, and any preliminary determination of legality by the arbitrator . . . should not be held to be binding upon the trial court.’ [Citation.] This is because ‘[t]he question of the validity of the basic contract [is] essentially a judicial question,’ whether the question is raised in opposition to a petition to compel arbitration or in a postarbitration petition to vacate an arbitral award.” (*Id.* at pp. 74-75.)

B.

The Parties’ Engagement Agreement Is Not Void as Against Public Policy Notwithstanding the Call & Jensen Parties’ Negligence in Failing to Disclose the Advice of Counsel Conflict.

Applying the analytical framework provided in *Sheppard*, we must determine whether the parties’ engagement agreement is void as against public policy; we conclude it is not. In *Sheppard*, former rule 3-310(C)(3) of the Rules of Professional Conduct expressly prohibited an attorney “‘without the informed written consent of each client’” from representing “‘a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.’” (*Sheppard, supra*, 6 Cal.5th at p. 80.) The Supreme Court explained, “‘Simply put,’ without informed written consent, ‘an attorney (and his or her firm) cannot simultaneously represent a client in one matter while representing another party suing that same client in another matter.’ [Citation.] This general prohibition applies even if ‘the simultaneous representations may have *nothing* in common.’” (*Ibid.*)

In *Sheppard*, the law firm did not dispute that its concurrent representation of the public entity and the manufacturing company came within the scope of former rule 3-310(C)(3) of the Rules of Professional Conduct. It was true in *Sheppard* that the law firm was fully aware of its concurrent representation (albeit in separate matters) of two

clients who were adverse to each other in the qui tam action after it ran the conflicts check, but chose to not disclose its concurrent representation to either client.

Here, nowhere in their appellate briefs do the eGumball parties argue that the Call & Jensen parties' failure to disclose the advice of counsel conflict violated the Rules of Professional Conduct or that their omission was anything other than negligent. Unlike *Sheppard*, the eGumball parties were not kept in the dark about the existence of another client represented by Call & Jensen whose interests might be adverse to them. The eGumball parties were fully aware of the fact Egley had worn two hats in his representation of them—first as employment counsel advising on a particular matter and then as trial counsel when that matter became a lawsuit. What was not, but should have been, disclosed was the potential legal significance of that dual status. Consequently, the disclosure omission here was of a lesser severity than that which occurred in *Sheppard*. Although not binding on this court, we note the arbitrator similarly observed in the final arbitration award that while the Call & Jensen parties' failure to disclose constituted conduct that fell below the standard of care, it was unintentional conduct and did not rise to the level of violating the Rules of Professional Conduct.²

Our research has not unearthed any statute or rule that was expressly violated by the Call & Jensen parties' disclosure omission. Thus, there is no risk here

² The arbitrator stated: “[T]he evidence clearly establishes that Mr. Egley never in a conscientious manner considered being a witness relative to the ‘advice of counsel defense;’ I do not believe the specific defense crossed his mind until the first day of trial, when he was approached by Bauer. There is no doubt in my mind that prior to trial, Mr. Egley should have considered the ‘advice of counsel’ defense and should have discussed it with Mr. Bauer. Not doing so fell below the standard of care. [¶] Mr. Egley had relevant testimony to provide. The testimony could have provided evidence upon which a jury could rely in not imposing punitive damages or in assessing a lesser dollar amount. [Citation.] On the other hand, Mr. Egley’s testimony could have hurt Mr. Bauer’s position.” The arbitrator ultimately concluded “[t]he evidence does not support that ‘but for’ Egley not disclosing the situation to Bauer, a more favorable result would have been achieved.”

that enforcement of the engagement agreement in this case would “countenance ‘a violation of a rule [the Supreme Court] formally approved in order “to protect the public and to promote respect and confidence in the legal profession.”’” (Sheppard, *supra*, at p. 74.) While the *Sheppard* court acknowledged that the Supreme Court itself has held that a contract or transaction “may be found contrary to public policy even if the Legislature has not yet spoken to the issue,” as pointed out by the eGumball parties, the court also stated it has recognized that “‘questions of public policy are *primarily* for the legislative department to determine.’” (*Id.* at p. 73, italics added.)

The eGumball parties have failed to supply any legal authority supporting an extension of *Sheppard* to invalidate engagement agreements which, as here, negligently omit a disclosure that should have been made, but even with such imperfection do not rise to the level of violating a statute or the Rules of Professional Conduct. We do not believe the Supreme Court intended *Sheppard* to be used to render void all attorney engagement agreements that negligently fail to disclose matters that *should* have been disclosed, regardless of the nature or materiality of the disclosure. We therefore agree that the parties’ engagement agreement, including its arbitration provision, was not void.

C.

The eGumball Parties’ Arbitrability Argument Is Forfeited for Failure to Submit the Issue to the Arbitrator for a Ruling.

In their opening brief, the eGumball parties also argue that, “conflict of interest aside,” the trial court should never have granted the Call & Jensen parties’ petition to compel arbitration because the eGumball parties never agreed to arbitrate eGumball’s legal malpractice and breach of contract claims or Call & Jensen’s claim for unpaid attorney fees. The eGumball parties do not dispute they entered into the engagement agreement; the following arbitration provision was contained in one of the “two ‘sister’ engagement letters” that were signed and agreed to by the eGumball parties:

“While we hope that there will never be any dispute regarding our services, *any dispute arising out of or related to this agreement or C&J’s relationship with you* will be resolved by mandatory binding arbitration before a single arbitrator employed by JAMS, formerly ‘Judicial Arbitration & Mediation Services,’ in Orange County, California, in accordance with the JAMS Comprehensive Arbitration Rules and Procedures effective October 1, 2010 (‘Rules’).” (Italics added.)

In their appeal, the eGumball parties challenge the reach of the arbitration agreement, arguing that because the arbitration provision was contained in the one of the two sister engagement letters that focused on disclosures related to Call & Jensen’s dual representation of eGumball and Bauer in the Perry litigation, it only applies to claims related to issues touching on that dual representation. In other words, they challenge the arbitrability of the parties’ respective claims asserting negligent legal representation and unpaid legal fees.

Were we to review the arbitrability issue de novo, we would conclude that, in agreeing to the arbitration provision, regardless of which engagement letter within which it was housed, based on its clear language, the parties agreed to arbitrate *all* claims related to the parties’ agreement regarding Call & Jensen’s retention as litigation counsel and even more broadly related to the eGumball parties’ relationship with Call & Jensen in general. No doubt the claims asserted by the parties against each other fall within the arbitration provision’s scope.

But, as noted by the trial court, the parties agreed the JAMS Comprehensive Arbitration Rules & Procedures, effective October 1, 2010, applied to any dispute among the parties. Rule 11(c) of those rules provides that the arbitrator determines arbitrability of a dispute, at least initially, stating: “Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, *interpretation or scope of the agreement under which Arbitration is sought*, and who are proper Parties to the Arbitration, *shall be submitted to and ruled on by the Arbitrator*.”

The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.” (Italics added.)

The eGumball parties do not assert in their appellate briefing that they ever submitted the arbitrability issue of any claim to the arbitrator for a ruling.

Unsurprisingly, the arbitrator’s final award does not comment on issues of arbitrability.

The eGumball parties have therefore forfeited their arbitrability argument and we do not consider it further.

III.

THE CALL & JENSEN PARTIES’ APPEAL

In their appeal, the Call & Jensen parties argue the trial court erred by failing to conclude the arbitrator exceeded his powers in denying Call & Jensen an award of internal attorney fees and expert witness fees incurred in the arbitration, and by failing to correct the arbitration award to include such an award. As we will explain, the trial court did not err because the arbitrator did not exceed his powers; any error committed by the arbitrator on these issues would constitute legal error that is not correctable by the courts.

A.

The Engagement Agreement’s Prevailing Party Attorney Fee and Cost Award Provisions

Each of the two sister engagement letters which make up the parties’ engagement agreement contains a different prevailing party attorney fees provision. The arbitration provision contained in one of the engagement letters simply states that the prevailing party in arbitration is “entitled to recover its attorneys’ fees and costs.” The other engagement letter contains the following provision regarding prevailing party attorney fees: “It is agreed and understood that any *disputes regarding our billing* shall be litigated in California under California law, with the prevailing party entitled to recover costs and attorneys’ fees *in connection with such dispute*, including the enforcement and/or appeal of any judgment, and including the standard hourly rate for

time spent by C&J attorneys working on such matter.” (Italics added.) Neither provision expressly refers to expert witness fees.

B.

Rule 24(g) of the JAMS Comprehensive Arbitration Rules & Procedures

The parties agreed to submit their claims to binding arbitration pursuant to the JAMS Comprehensive Arbitration Rules & Procedures in effect October 1, 2010. The rules do not specifically address awards of internally incurred attorney fees or awards of expert witness fees. Rule 24(g) of those rules states in relevant part: “The Award of the Arbitrator may allocate attorneys’ fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties’ agreement or allowed by applicable law.”

C.

The Arbitrator’s Rulings Regarding Prevailing Party Attorney Fees and Costs

In the final arbitration award, the arbitrator ruled on the prevailing party attorney fees issue as follows: “The present matter was one for legal malpractice; it was not based on contract. While Call & Jensen pursued a claim to recover attorney’s fees pursuant to the retainer agreement, fully five minutes was spent on the claim. The remainder of the arbitration and all of the evidence focused on eGumball’s affirmative claim for legal malpractice relative to John Egley’s alleged negligence and breach of fiduciary duty. To characterize this action as anything other than one for legal malpractice would indeed be a misnomer. [Citation.]

“Even though the present litigation is a tort action about legal malpractice, the agreement entered into between the parties provides for an award of attorney’s fees to the prevailing party. The agreement specifically provides that the prevailing party is entitled to attorney’s fees, *in ‘any dispute regarding [Call & Jensen’s] services.’* (Emphasis added.)

“With this said, I find that Call & Jensen is not entitled to their in-house fees, which comprise the bulk of the attorney’s fees sought. In *Ellis Law Group v. Nevada City Sugar Loaf Properties* (2014) 230 Cal.App.4th 244, the Court, citing a long line of authority, held that a self-represented defendant after prevailing on a SLAPP motion, was not entitled to attorney’s fees. In so finding the court relied on numerous cases dealing with Civil Code section 1717. I find the discussion at pages 253-256 persuasive and applicable to the present matter.

“In support of its argument for in-house attorney’s fees, Call and Jensen relies on *Lockton v. O’Rourke* (2010) 184 Cal.App.4th 1051. The case is inapposite. There, the contract between the client and the attorney specifically provided that the “prevailing party in any action or proceeding to enforce any provision of this agreement will be awarded attorney’s fees and costs incurred in that action or proceeding, including, without limitation, the value of the time spent by QEUE&H attorneys to prosecute or defend such an action (calculated at the hourly rate(s) then normally charged by QEUE&H to clients which it represents on an hourly basis.)” [Citation.] Such a provision is not present in the contract at issue.

“As a comparable provision to that found in *Lockton*, Call and Jensen points to the following provision of its January 30 agreement: ‘It is agreed and understood that *any disputes regarding our billings* shall be litigated in California under California law, with the prevailing party entitled to recover costs and attorneys’ fees in connection with such dispute, including the enforcement and/or appeal of any judgment, and including the standard hourly rate for time spent by C&J attorneys working on such matter[s].’ [Citation.] As indicated earlier, the present action is not about ‘billings,’ it is about the alleged negligence and breach of fiduciary duty of John Egley and Call and Jensen. The provision is therefore not applicable and under *Ellis Law Group, supra*, Call and Jensen is not entitled to reimbursement for the value of its attorney fees.”

The arbitrator added in a footnote: “At the Arbitration hearing Call and Jensen spent approximately 5 minutes laying foundation for the underlying bills. The bills and amounts thereof were not contested. While in name Call and Jensen may have been the claimant, the facts and issues relative to Call and Jensen’s alleged negligence was not raised as a defense to the claim; from the outset, eGumball was seeking affirmative relief for legal malpractice with Call and Jensen defending its position.”

After the arbitrator issued the final arbitration award, Call & Jensen submitted a request to the arbitrator to correct the award regarding internally incurred attorney fees and to award recovery of expert witness fees. The arbitrator denied the request, stating: “As for in house attorney’s fees, the arbitrator fully realizes that in *Ellis Law Group v. Nevada Sugar Loaf Properties* (2014) 230 Cal.App.4th 244, there was no agreement that the law firm seeking to recover the value of internal time, could do so. The case does however, at pages 253-256 set forth the law that self-represented attorneys are generally not entitled to reasonable attorney’s fees for their in-house time. As acknowledged in the Final Award, *Lockton v. O’Rourke* (2[0]10) 184 Cal.App.4th 1051, provides an exception thereto. The present matter however, does not fall under *Lockton*. In the present case, the contract provided in-house fees could be awarded in any dispute regarding billings. As has been found, the present matter was not about billings, rather it dealt with affirmative allegations of legal malpractice.”

With regard to the issue of expert witness fees, the arbitrator stated: “[B]y its terms, Code of Civil Procedure section 998 applies to Arbitrations. . . . Here, by way of the Interim Award the parties were invited to seek what further relief they deemed proper. Call & Jensen did not seek costs pursuant to Code of Civil Procedure section 998. As such they were not awarded said costs in the Final Award.”

D.

The Arbitrator Did Not Exceed His Powers by Denying Call & Jensen An Award of Internal Attorney Fees and Expert Witness Fees.

Citing, inter alia, Code of Civil Procedure section 1286.6, the Call & Jensen parties petitioned the trial court to correct the arbitrator's award to include an award in favor of Call & Jensen of its internal attorney fees and expert witness costs and, as so corrected, confirm the award. Call & Jensen argued the arbitrator exceeded his powers by disallowing internally incurred attorney fees and expert witness fees. The trial court did not err by denying the petition to correct the award.

“When parties contract to resolve their disputes by private arbitration, their agreement ordinarily contemplates that *the arbitrator will have the power to decide any question of contract interpretation*, historical fact or general law necessary, in the arbitrator's understanding of the case, to reach a decision. [Citations.] Inherent in that power is the possibility the arbitrator may err in deciding some aspect of the case. Arbitrators do not ordinarily exceed their contractually created powers simply by reaching an erroneous conclusion on a contested issue of law or fact, and arbitral awards may not ordinarily be vacated because of such error, for “[t]he arbitrator's resolution of these issues is what the parties bargained for in the arbitration agreement.”” (*Gueyffier v. Ann Summers, Ltd.* (2008) 43 Cal.4th 1179, 1184 (*Gueyffier*), italics added; see *Moshonov v. Walsh* (2000) 22 Cal.4th 771, 775 [it is settled that arbitrators do not exceed their powers “merely by rendering an erroneous decision on a legal or factual issue, so long as the issue was within the scope of the controversy submitted to the arbitrators”].)

“An exception to the general rule assigning broad powers to the arbitrators arises when the parties have, in either the contract or an agreed submission to arbitration, explicitly and unambiguously limited those powers. [Citation.] ‘The powers of an arbitrator derive from, and are limited by, the agreement to arbitrate. [Citation.] Awards

in excess of those powers may, under [Code of Civil Procedure] sections 1286.2 and 1286.6, be corrected or vacated by the court.’ [Citation.] The scope of an arbitrator’s authority is not so broad as to include an award of remedies ‘expressly forbidden by the arbitration agreement or submission.’” (*Gueyffier, supra*, 43 Cal.4th at p. 1185.)

In *Gueyffier, supra*, 43 Cal.4th at page 1185, the Supreme Court concluded: “The arbitrator was empowered to interpret and apply the parties’ agreement to the facts he found to exist; included therein was the power to decide when particular clauses of the contract applied.” In that case, the court stated: “In concluding the notice-and-cure provision was inapplicable on the facts as he found them, the arbitrator did no more than exercise this power. [Citations.] The no-modification clause could perhaps be *interpreted* as also precluding equitable excusal of a condition, but the arbitrator evidently did not adopt such an interpretation. As construction of the contract was for the arbitrator, not the courts, we cannot say he exceeded his powers, within the meaning of [Code of Civil Procedure] section 1286.2, subdivision (a)(4), by failing to adopt a particular interpretation of the agreement.” (*Id.* at pp. 1185-1186.)

The *Gueyffier* court distinguished *DiMarco v. Chaney* (1995) 31 Cal.App.4th 1809, a case the Call & Jensen parties relied on in their appellate briefs and at oral argument, stating: “[I]n *DiMarco v. Chaney, supra*, 31 Cal.App.4th at page 1815, the appellate court held the arbitrator had exceeded his powers by refusing to make an award of attorney fees to the litigant he expressly found to be the prevailing party despite the contract’s provision that “‘the prevailing party *shall* be entitled to reasonable attorney’s fees and costs.”” The court in *DiMarco v. Chaney* found a direct, explicit contradiction between the contractual command and the arbitrator’s refusal to award the prevailing party fees, whereas no such inescapable contradiction exists in this case. The franchise agreement did not unambiguously forbid the arbitrator’s application of an equitable defense to *Gueyffier*’s performance of the notice-and-cure condition.” (*Gueyffier, supra*, 43 Cal.4th at p. 1188.) The Supreme Court concluded the appellate

court had erred “in holding the arbitrator exceeded his powers by declining, on equitable grounds, to enforce the notice-and-cure condition against Gueyffier. It follows the award should not be vacated under [Code of Civil Procedure] section 1286.2, subdivision (a)(4).” (*Ibid.*)

Here, the parties submitted the issues of determining prevailing party attorney fees and expert witness fees to the arbitrator for rulings. The arbitrator denied Call & Jensen an award of internal attorney fees based on *Trope v. Katz* (1995) 11 Cal.4th 274 and its progeny establishing the general rule that “law firms and attorney litigants are precluded from recovering attorney fees for self-representation.” (*Soni v. Wellmike Enterprise Co. Ltd.* (2014) 224 Cal.App.4th 1477, 1488.)

As reflected in the arbitrator’s final award, Call & Jensen argued that *Lockton v. O’Rourke, supra*, 184 Cal.App.4th 1051 created an exception to the general rule so as to permit the recovery of internally incurred attorney fees when the parties’ agreement expressly so provides. The arbitrator rejected the applicability of the exception, concluding the parties’ engagement agreement provided that internally incurred attorney fees were only recoverable in connection with “billing” disputes.

In the final award, the arbitrator noted that all but “five minutes” of the arbitration was spent addressing the malpractice issues in the case. The bills Call & Jensen submitted regarding unpaid legal fees from the Perry litigation were not disputed by the eGumball parties in type or amount. Therefore, the arbitrator reasoned, as the request for internal attorney fees was based on fees incurred in defending the malpractice claim, not in connection with a billing dispute, Call & Jensen was not entitled to recover such fees under the terms of the engagement agreement.

The arbitrator’s decision not to award such fees was entirely based on the arbitrator’s interpretation of the engagement agreement. There was not “a direct, explicit contradiction between the contractual command and the arbitrator’s refusal to award the prevailing party fees.” (*Gueyffier, supra*, 43 Cal.4th at p. 1188.) If the arbitrator erred in

his interpretation, any such error would constitute legal error and not an act in excess of his powers.

As to expert witness fees, Call & Jensen failed to show the arbitrator was required to award such fees under the language of the engagement agreement, rule 24(g) of JAMS Comprehensive Arbitration Rules & Procedures, or otherwise by law. Code of Civil Procedure section 1033.5, subdivision (a)(8) allows recovery of “[f]ees of expert witnesses ordered by the court.” The parties do not argue any such order was issued in this case. The arbitrator concluded expert witness fees were not recoverable under Code of Civil Procedure section 998 because an offer to compromise under subdivision (b) of that statute was never made. If the trial court erred in its conclusion, like its ruling denying internal attorney fees, any such error would constitute legal error.

The trial court, therefore, did not err by concluding the arbitrator did not exceed his powers or by refusing to correct the award to include internally incurred attorney fees and expert witness fees.

DISPOSITION

The judgment is affirmed. Because each party prevailed on appeal in part, no party shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

O’LEARY, P. J.

IKOLA, J.